No. 86-42

IN THE SUPREME COURT OF THE STATE OF MONTANA

1986

MISSOULA COUNTY HIGH SCHOOL DISTRICT,

Petitioner and Respondent,

-vs-

BOARD OF PERSONNEL APPEALS OF THE STATE OF MONTANA, and MISSOULA COUNTY HIGH SCHOOL EDUCATION ASSOCIATION, MEA,

Respondents and Appellants.

APPEAL FROM: District Court of the Fourth Judicial District, In and for the County of Missoula, The Honorable Jack L. Green, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Hilley & Loring; Emilie Loring, Great Falls, Montana
Mary Anne Simpson, Bd. of Personnel Appeals, Helena, Montana

For Respondent:

Worden, Thane & Haines; Molly Shepherd, Missoula, Montana

Submitted on Briefs: May 30, 1986

Decided: November 13, 1986

Filed: NOV 13 1986

Ethel M. Harrison

Clerk

Mr. Justice L. C. Gulbrandson delivered the Opinion of the Court.

The Montana Board of Personnel Appeals (the BPA) and the Missoula County High School Education Association (MCHSEA) appeal a Missoula County District Court order which ruled that the Missoula County High School District (the School District) did not commit an unfair labor practice in violation of § 39-31-401, MCA. The District Court order reversed a BPA decision that the School District violated § 39-31-401, MCA, by paying certain non-striking teachers for eighteen days of work where those teachers had agreed to work eighteen days but actually worked only one day. The issues on appeal are whether the District Court erred by reversing; (1) the BPA's conclusion of law that the School District's conduct was not justified by a legitimate, substantial, business necessity; (2) the BPA's conclusion of law that the School District's action was inherently destructive of protected labor rights; and (3) the BPA's finding of fact that the non-striking teachers were not available and on-call after June 4, 1981. We affirm.

MCHSEA is the recognized exclusive bargaining representative of the School District's non-supervisory certificated or licensed employees. On May 11, 1981, MCHSEA went on strike against the School District. The School District did not attempt to operate the Missoula schools during the first week of the strike. On June 1, 1981, the School District superintendent sent a letter to all members of the bargaining unit. In pertinent part, that letter stated:

> The school district has just received definite legal advice that our schools must be open for 180 days in the 1980-81 school year or we will lose $1.275 million in state aid.
>
> . . . A $1.275 million cut would necessarily mean much larger class sizes, reduced curricular and extra-curricular offerings.
>
> Schools must open June 4, 1981 if this community is to maintain the quality of our school program for next year . . .
>
> High schools will open on June 5th for freshman, sophomore and junior classes . . . All high school teachers should notify their principal by 4:00 p.m. June 3, 1981 indicating a willingness to work commencing with a PIR day at 8:00 a.m. June 4, 1981 . . .
>
> Teachers returning June 4th to completion of the school year shall receive for the 1980-81 school year an average 10.6% increase as per the attached salary schedule which includes increments and horizontal changes. This payment will be retroactive to August 27, 1980. All fringe benefits including insurance for June will be paid.

Twenty teachers notified the School District's administration that they would return to work if the School District attempted to operate. The School District opened the Missoula schools on June 4, 1981. Three teachers who had agreed to return did not do so because of either illness or family emergency. After the first day and with what is described as good and sufficient reasons, the School District's Board of Trustees determined it would be inappropriate to continue the operation of the schools. The School District made no further attempt to operate the schools for the balance of the 1980-81 school year.

In April 1982, a Missoula attorney, representing one of the teachers who returned to work, sent a letter to the

Missoula County High School Board of Trustees. The letter stated that the School District superintendent's June 1 letter was an offer of employment for a specific term; that the School District did not reserve the right to terminate the offer or any agreement arising therefrom; that, in the attorney's opinion, a contractual relationship existed between the School District and the teacher for employment for a specific number of days commencing on June 4, 1981, and ending on the 180th day of the 1980-81 school year; and that the School District breached the agreement by refusing to pay the teacher for work he was prepared to perform. In July 1982, the attorney sent another letter to the School District on behalf of the same teacher. That letter again explained the basis of the teacher's claim and stated that the teacher was seriously contemplating legal action.

In September 1982, upon the advice of its attorney, the School District paid the twenty returning teachers for the remaining eighteen days they had agreed to teach. The School District did not pay any of the striking teachers for this period.

In October 1982, the MCHSEA filed an unfair labor practice charge with the BPA alleging that the School District had discriminated against those teachers who had supported the strike. The union sought: (1) reimbursement of all amounts deducted from the striking teachers' salaries because of their participation in the strike, and (2) corresponding contributions to the teachers' retirement system. In June 1983, counsel for MCHSEA and counsel for the School District agreed to a stipulation of facts which was submitted to the BPA. In December 1983, a hearing officer

from the BPA issued his findings of fact, conclusion of law and order ruling that the School District had committed unfair labor practices violating § 39-31-401(1) and (3), MCA.

Specifically, the hearing officer ruled that the School District's conduct was inherently destructive of the public employees' self-organizational rights; that there was no substantial and legitimate business justification for the School District's actions; and that the non-striking teachers were not on-call during the seventeen days in question. The School District filed exceptions to the hearing officer's decision with the BPA. The full BPA held an oral argument on this case in March 1984. In June 1984, the BPA issued its final order adopting the hearing examiner's findings of fact and conclusions of law. The BPA ordered the School District to stop violating § 39-31-401(1) and (3), MCA, and fashioned two alternative remedies to compensate the striking teachers.

In July 1984, the School District filed a petition for judicial review and for declaratory judgment with the Missoula County District Court. The BPA and the MCHSEA filed answers and the District Court, sitting without a jury, heard oral arguments in June 1985. In November 1985, the court entered its findings of fact, conclusions of law and order. The court made the following conclusions of law: in view of the evidence, the BPA clearly erred in finding that the teachers did not make themselves available and did not remain on-call after June 4, 1981; the BPA abused its discretion and committed an error of law by concluding that the School District was under no obligation to pay the teachers for more than one day of work; the BPA abused its discretion and committed an error of law in concluding that the payment to

the teachers was inherently destructive of protected rights and, therefore, no proof of anti-union motivation was required; and that the BPA abused its discretion and committed an error of law by concluding that the School District's conduct was clearly prohibited under § 39-31-401, MCA. This appeal followed.

Section 39-31-401, MCA, provides in part:

> It is an unfair labor practice for a public employer to:
>
> (1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201;
>
> . . .
>
> (3) discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in any labor organization; however, nothing in this chapter or in any other statute of this state precludes a public employer from making an agreement with an exclusive representative to require, as a condition of employment, that an employee who is not or does not become a union member, must have an amount equal to the union initiation fee and monthly dues deducted from his wages in the same manner as checkoff of union dues; . . .

Section 39-31-201, MCA, provides:

> Public employees shall have and shall be protected in the exercise of the right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.

These statutes are virtually identical to parts of the federal National Labor Relations Act (NLRA), 29 U.S.C. § 157 and § 158. This Court and the BPA both look to National

Labor Relations Board and federal court interpretations of the NLRA for guidance in interpreting the equivalent Montana statutes. Teamsters, Etc. v. St. Ex Rel. Bd. of Personnel (1981), 195 Mont. 272, 635 P.2d 1310; State v. Dist. Court of Eleventh Jud. Dist. (1979), 183 Mont. 223, 598 P.2d 1117.

Where, as here, a district court reviews an agency decision, the standard of review is set forth in the Montana Administrative Procedure Act at § 2-4-704, MCA. The relevant portions of that statute state:

> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (g) because findings of fact, upon issues essential to the decision, were not made although requested.

Addressing the statute, this Court has stated:

> [F]indings of fact by an agency have been subject to a "clearly erroneous" standard of review by the courts . . . Conclusions of law are subject to an

> "abuse of discretion" review. These standards differ due to the agency's expertise regarding the facts involved and the court's expertise in interpreting and applying the law. (Citations omitted.)

City of Billings v. Billings Firefighters (1982), 200 Mont. 421, 430, 651 P.2d 627, 632.

The BPA held that the School District had violated subsections (1) and (3) of § 39-31-401, MCA. Under the equivalent federal statutes (29 U.S.C. § 158(a)(1) and (3)),any violation of subsection (3) necessarily includes a derivative violation of subsection (1). N.L.R.B. v. Swedish Hospital Med. Center (9th Cir. 1980), 619 F.2d 33, 35. Subsection (1) "was intended as a general definition of employer unfair labor practices. Violations of it may be either derivative, independent, or both." Fun Striders, Inc. v. N.L.R.B. (9th Cir. 1981), 686 F.2d 659, 661. In this case, the BPA did not specify whether the subsection (1) violation was derivative from the subsection (3) violation or whether it was an independent violation. However, language in the hearing examiner's opinion indicates that he considered there to be an independent violation of § 39-31-401(1), MCA. Thus, we proceed as if the BPA had found an independent violation of subsection (1).

Section 39-31-401(3), MCA, makes it an unfair labor practice for a public employer to "discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in any labor organization . . . " Addressing the federal counterpart to this section, the United States Supreme Court stated:

> [T]he intention was to forbid only those acts that are motivated by an anti-union animus . . . But an employer may take actions in the course of a labor dispute that present a complex of motives . . . and it is often difficult to identify the true motive.
>
> In these situations the Court has divided an employer's conduct into two classes . . . Some conduct is so "'inherently destructive of employee interests'" that it carries with it a strong inference of impermissible motive . . . In such a situation, even if an employer comes forward with a nondiscriminatory explanation for its actions, the Board "may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." . . . On the other hand, if the adverse effect of the discriminatory conduct on employee rights is "'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." (Citations omitted.)

Metropolitan Edison Co. v. NLRB (1983), 460 U.S. 693, 700-701, 103 S.Ct. 1467, 1473, 75 L.Ed.2d 387, 396. In this case, the BPA found that the School District had no substantial, legitimate business justification for making the payments to the teachers and that the payments were inherently destructive of the striking teachers' union interests. Thus, the BPA found a violation of § 39-31-401(3), MCA.

The first issue is whether the District Court erred by reversing the BPA's conclusion of law that the School District had no legitimate business justification for making the payments. We first note that although the BPA and the hearing examiner characterized this conclusion as a finding

of fact, it is more properly seen as a conclusion of law. Thus, that conclusion is subject to the "abuse of discretion" standard of review.

The stipulated facts show that the payment was made only after an attorney for one of the teachers threatened legal action. Two letters from that attorney are attached as exhibits to the stipulated facts. The attorney asserted that the superintendent's letter was an offer of employment for a specific number of days; i.e. from June 4th to the completion of the 180th day of the school year. The attorney charged that the teacher was prepared to perform for the term of the contract and that the School District breached the agreement by refusing to pay him for the work he was prepared to perform. At the hearing before the full Board of Personnel Appeals, board members discussed and considered a letter from the School District's superintendent. Although that letter was not part of the stipulated facts, no objection was made to consideration of that letter and it is properly part of the record before this Court. See § 39-31-409(3), MCA. The superintendent's letter shows (1) that an attorney advised the School District that the teacher's claim was valid and (2) that the School District decided not to litigate the claim because of the increased cost to do so. The letter expressed concern that if the School District was unsuccessful in contesting the claim, the court would order the School District to pay the teacher's attorney's fees which would increase the loss by 30-40%. The hearing examiner disagreed with the School District and found that there was no obligation to pay the teachers except for the one day they worked. Thus, the hearing examiner and the BPA

concluded there was no business justification for paying the claim. We agree with the District Court that that conclusion was an abuse of discretion.

We need not decide for the purposes of this opinion whether the School District or the BPA correctly determined the legitimacy of the teacher's claim.

> The legitimacy of the [School District's] conduct for purposes of the analysis prescribed by Great Dane depends not on the truth of its assertions regarding its contractual obligations but rather on the reasonableness and bona fides with which it held its beliefs.
>
> . . .
>
> The First Circuit's decision in NLRB v. Borden, Inc., Borden Chemical Division, 600 F.2d 313 (1st Cir. 1979), is persuasive in this regard. In Borden, the employer withheld accrued vacation pay because of the employees' strike activity until after the contractual vacation period had expired. The Board rejected the employer's assertion that it was acting pursuant to a contractual obligation, i.e., "employees shall not be paid vacation pay in lieu of vacation," and concluded that the denial of vacation benefits was inherently destructive of the employees' rights. The First Circuit remanded the case, declaring:
>
> "Borden did come forward with evidence of a business justification for its conduct, namely, the terms of the collective bargaining agreement and past practice.
>
> The Board found this reason invalid because its interpretation of the contract differed from that of Borden's. This, however, is not a question of contract interpretation. The Board had a duty to determine whether Borden was motivated by its reliance on the collective bargaining agreement or by anti-union animus when it withheld the accrued vacation benefits. We caution the Board that it is neither our function nor the Board's to second-guess business decisions. "The Act was not intended to guarantee that business decisions be sound, only that they not be the product

> of antiunion motivation" (Emphasis in original.) (Citations omitted.)

Vesuvius Crucible Co. v. N.L.R.B. (3rd. Cir. 1981), 668 F.2d 162, 167. See also Stokely-Van Camp, Inc. v. N.L.R.B. (7th Cir. 1983), 722 F.2d 1324.

In Vesuvius, the employer, interpreting a collective bargaining agreement, refused to pay allegedly accrued vacation benefits to any employee, striking or nonstriking. The NLRB found that this interpretation of the collective bargaining agreement was incorrect, that the employees' right to the benefits had accrued, and that the employer committed unfair labor practices in refusing to pay. The Third Circuit reversed finding the company's interpretation reasonable and arguably correct. The Vesuvius court found that the NLRB overstepped its authority in formulating its own interpretation of the contract.

The instant case is similar to Borden and Vesuvius. Here, the hearing examiner disagreed with the School District's interpretation of the contract but he did not address the reasonableness of that interpretation. We find that the School District made a reasonable interpretation of the contract and paid the claim out of a bona fide belief that the claim was valid. The School District paid the claim only after the teacher threatened to file suit to collect. Moreover, the School District's attorney advised the School District that this was a legal claim which should be paid. Finally, we find that the School District's interpretation of the contract was arguably correct. Therefore, we affirm the District Court's reversal of the BPA's conclusion that the

School District had no substantial, legitimate business justification for the payment.

The second issue is whether the lower court properly reversed the BPA's conclusion that the School District's action was inherently destructive of protected labor rights. Inherently destructive conduct, in this context, is conduct which carries with it, ". . . unavoidable consequences which the employer not only foresaw but which he must have intended" and thus bears "its own indicia of intent." (Citation omitted.) N.L.R.B. v. Great Dane Trailers (1967), 388 U.S. 26, 33, 87 S.Ct. 1792, 1797, 18 L.Ed.2d 1027, 1034. The Ninth Circuit Court of Appeals describes those cases finding inherently destructive conduct as:

> [C]ases involving conduct with far reaching effects which would hinder future bargaining, or conduct which discriminates solely upon the basis of participation in strikes or union activity. Examples of inherently destructive activity are permanent discharge for participation in union activities, granting of superseniority to strike breakers, and other actions creating visible and continuing obstacles to the future exercise of employee rights. (Citation omitted.)

Portland Willamette Co. v. N.L.R.B. (9th Cir. 1976), 534 F.2d 1331, 1334. The Portland Willamette Co. court declined to find inherently destructive conduct in an employer's proposal, during a strike, to grant a retroactive pay increase to workers who had returned to, and remained at, work by a certain date.

General Electric Co. (1948), 49 NLRB 510, 23 LRRM 1094, supports a conclusion that there was no inherently destructive conduct in this case. In General Electric the

employees engaged in a strike and the employer, upon the strike's termination, paid full wages for the entire strike period to those employees who had indicated a willingness to work during the strike. Although the compensated employees actually did no work during the strike, the NLRB found that those workers were "on call" and available for work. The NLRB found no unlawful disparity of treatment in paying full wages to those workers for the strike period.

In this case, the BPA found that the teachers were not on-call and did not make themselves available for work after the first day. The District Court ruled that this finding was clearly erroneous. The propriety of this ruling is the third issue on appeal. The facts support an inference that the teachers did make themselves available to work the entire period in question. The superintendent's letter soliciting teachers (the offer) clearly contemplated that the teachers would work until the completion of 180 school days, i.e., for eighteen more days. By showing up for work the first day, the teachers accepted the offer and implicitly agreed to work, and make themselves available, for eighteen days.

The BPA found that the School District discriminated against the strikers solely on the basis of union activity. We disagree. The School District discriminated in favor of the non-strikers because they took the affirmative step of agreeing to teach for eighteen days and forego other options for those days. Moreover, the payments were made more than a year after the strike and only after the threat of a lawsuit. The School District's conduct arose out of a unique situation and is not the equivalent of permanently discharging strikers or granting superseniority to non-strikers. The inherently

destructive label simply does not fit this conduct. Therefore, we uphold the District Court's reversal of the BPA on this point.

We concede that the School District's conduct may have had a comparatively slight impact on employee rights. Teachers may hesitate slightly in joining future strikes. To find a violation of § 39-31-401(3), MCA, where the discriminatory conduct has comparatively slight effect, "[A]n antiunion motivation must be proved to sustain the charge if [as here] the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." Metropolitan Edison Co., 460 U.S. at 701. The BPA concedes, and the record shows, that there is no evidence that the School District acted with an anti-union motive. Therefore, we hold that there was no violation of § 39-31-401(3), MCA.

Finally, we address the issue of whether there was an independent, as opposed to derivative, violation of § 39-31-401(1), MCA.

> Such a violation is established by showing:
>
> (1) that employees are engaged in protected activities, (citation omitted);
>
> (2) that the employer's conduct tends to "interfere with, restrain, or coerce employees" in those activities, (citation omitted); and
>
> (3) that the employer's conduct is not justified by a legitimate and substantial business reason, (citation omitted).

Fun Striders, Inc., 686 F.2d at 661-662. We held above that the employer's conduct was justified by a legitimate and

substantial business reason. Therefore, there can be no independent violation of § 39-31-401(1), MCA.

The District Court properly reversed the BPA order finding unfair labor practices.

Affirmed.

Justice

We concur:

Chief Justice

Justices

Honorable Henry Loble, Judge of the District Court sitting in place of Mr. Justice John C. Harrison.

Mr. Justice William E. Hunt, Sr., dissenting:

I dissent. I would uphold the BPA decision that the School District violated § 39-31-401, MCA, by paying the non-striking teachers for eighteen days of work where those teachers actually worked only one day. The facts as set out by the majority refer to the letter sent to all teachers by the School District, however the majority opinion does not set out that letter in full. There is one key sentence omitted. That sentence is the last sentence of the letter which reads:

"Teachers who do not report for duty by 8:00 a.m. on June 4, 1981 will be replaced."

This sentence is the crux of that letter, as is shown by the fact that the School Board refers to this letter in the minutes of its meetings as the "replacement letter." The letter further states, "Teachers returning June 4th to completion of the school year shall receive . . . an average 10.6% increase . . .." Twenty teachers told the District's agents that they would return on June 4. Seventeen actually worked June 4th, two of the teachers had a family emergency and one was sick. On the evening of June 4 the School District decided to close Missoula county high schools through Friday, June 5. On Sunday, June 7 the Board decided to close the schools for the remainder of the 1980-81 academic year.

The first issue raised on appeal, is whether the District Court erred in reversing the BPA's finding of fact that non-striking teachers were not available and on-call after June 4, 1981. The School District urges that the payment for eighteen days

of work when only one was in fact worked was approved in General Electric Co. (1948), 80 NLRB 510, 23 LRRM 1094. In General Electric, the employer paid employees who made their services available and remained on-call in a standby capacity. The employer refused to pay strikers. The NLRB held that the payment to non-strikers who did not work was not discriminatory because they remained subject to the employer's call on a standby capacity which was compensable as a matter of law. Thus the factual issue of whether the returning teachers were on-call after June 4, 1981 becomes crucial. The BPA held they were not because the schools were closed and the school year was over. I agree that the returning teachers could not have remained on call for seventeen days after the schools had closed for the academic year, thus I would hold that General Electric has no application to this case. The conduct of the School District was to divide the work force into those who decided to go out on strike and those who did not and to reward the latter group.

The United States Supreme Court has set out the test to determine if discriminatory conduct constitutes an unfair labor practice in NLRB v. Great Dane Trailers, Inc. (1967), 388 U.S. 26, 34, 87 S.Ct. 1792, 1798, 18 L.Ed.2d 1027, 1035.

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which

> could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. (Emphasis in original.)

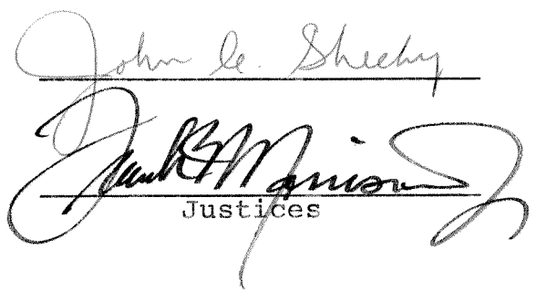
The payment for seventeen days of unworked time is not so insignificant that the teachers will not reflect before participating in future strikes. The hearing examiner estimated the cost to the District to be approximately $40,000 or $2,000 per employee. There have been many decisions that have found unlawful interference with the right to strike under similar circumstances. NLRB v. Great Dane, supra (grant of vacation benefits to only nonstrikers was an unfair labor practice); NLRB v. Erie Resistor Corp. (1963), 373 U.S. 221, 83 S.Ct. 1139, 10 L.Ed.2d 308 (grant of super seniority to nonstrikers was an unfair labor practice); George Banta Co., Inc., Banta Div. v. NLRB (D.C. Cir. 1982), 686 F.2d 10 cert. den. (1983), 460 U.S. 1082, 103 S.Ct. 1770, 76 L.Ed.2d 344 (grants of preferential reinstatement and seniority rights to employees who abandoned a strike early was an unfair labor practice.); Soule Glass and Glazing Co. v. NLRB (1st. Cir. 1981), 652 F.2d 1055 (a 25¢ per hour wage increase to employees working as of the first day of a strike was an unfair labor practice.); NLRB v. Swedish Hospital Medical Center (9th Cir. 1980), 619 F.2d 33 (granting a one day vacation to non-strikers, those who returned early and those hired during the strike was an unfair labor practice); NLRB v. Rubatex Corp. (4th Cir. 1979), 601 F.2d 147 cert. den. (1979), 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (bonuses of of $100 to $25 for those who worked during the strike paid after the strike was over were an unfair labor practice.); NLRB v. Frick Co., (3d Cir. 1968), 397 F.2d 956 (refusing vacation pay to strikers while paying non-strikers

was an unfair labor practice.); Aero-Motive Manufacturing Co. (1972), 195 NLRB 790, 79 LRRM 1496, enf'd, (6th Cir. 1973), 475 F.2d 27, ($100. bonus to those who worked through a strike, not awarded or announced until after the strike was an unfair labor practice.). The Court in Aero-Motive stated that by distinguishing "solely on the basis of who engaged in protected, concerted activity and who did not." such payments ". . . not only created a divisive wedge in the work force, but also clearly demonstrated for the future the special rewards which lie in store for employees who choose to refrain from protected strike activity." Aero-Motive, 195 NLRB at 792, 79 LRRM at 1498. I would adopt the rationale of Aero-Motive and conclude that the conduct of the School District was inherently destructive of the employees right to strike. Further, the business justification advanced by the School District does not constitute a legitimate substantial business necessity. The District received two letters from counsel for one of the teachers claiming he was due compensation for eighteen days although the terms of the agreement were, "to the completion of the school year" which ended June 4th. Further, the business necessity advanced by the School District does not explain why all twenty teachers were paid for the remaining seventeen days, even though three of those teachers did not work and were not paid for June 4th.

I would reverse the decision of the District Court and affirm the decision of the BPA.

William E. Hunt
Justice

Mr. Justice John C. Sheehy and Mr. Justice Frank B. Morrison concur with the above dissent.



Justices

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA

MISSOULA COUNTY HIGH SCHOOL DISTRICT,

Plaintiff,

-vs-

BOARD OF PERSONNEL APPEALS OF THE STATE OF MONTANA and MISSOULA COUNTY HIGH SCHOOL EDUCATION ASSOCIATION, MEA,

Defendants.

LLP-34-82

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Cause No. 59927 /12

This cause came on regularly before the Court sitting without jury on the Petition of Missoula County High School District for Judicial Review of the Final Order of the Board of Personnel Appeals in case No. 34-82 and for Declaratory Judgment. Respondents, Board of Personnel Appeals, and Missoula County Education Association, MEA, filed Answers. All parties presented briefs. Petitioner filed a motion for judgment and oral arguments were heard before the Court sitting without jury on June 13, 1985.

This Court, having reviewed the Administrative Record and briefs, having heard the oral arguments, being fully advised now enters the following:

FINDINGS OF FACT

I

Petitioner, Missoula County High School District, (MCHS) operates four high schools and a vocational technical center in Missoula County, Montana. Respondent, Missoula County High School Association, (MCHSEA) is affiliated with the Montana Educational Association and is the exclusive bargaining

representative of Petitioner's non-supervisory certified or licensed employees. Respondent, Board of Personnel Appeals of the State of Montana, (BPA) is an administrative agency of the State of Montana.

II

Petitioner MCHS and Respondent MCHSEA had a master contract effective from July 1, 1979, through June 30, 1981. The contract contained an opening clause for salaries and insurance for 1980-81, the second year of the contract. The parties opened negotiations for second year salaries, but were unable to reach agreement. On May 11, 1981, Respondent, MCHSEA went on strike against Petitioner. During the first week of the strike the Petitioner did not attempt to operate the schools.

III

On June 1, 1981, Petitioner sent all members of the bargaining unit a letter stating Petitioner's intent to reopen the schools on June 4, 1981. The letter stated salary and fringe benefits by reference to a schedule, time and dates when teachers should notify their principals of their intent to work, and the times and places where they should report for work.

IV

Twenty high school teachers reported their intent to return to work. On June 4, 1981, seventeen of those twenty reported for work; three of the twenty did not report for work because of illness or family emergency. Petitioner opened the schools on June 4, 1981.

V

Petitioner's Board of Trustees, for good and sufficient reasons, determined that it would be inappropriate to continue the operation of the schools. Petitioner made no further attempt to operate the schools for the balance of the 1980-81 school year.

VI

In September, 1982, following threat of suit by one or more of the teachers who agreed to return to work, Petitioner paid the twenty teachers who had agreed to work for the remaining eighteen days for which they had agreed to teach. None of the teachers who did not indicate their intent to return to work on June 4, 1981, were paid for the eighteen days.

VII

On October 19, 1982, Defendant, Missoula County High School Education Association, filed an Unfair Labor Practice charge against Petitioner alleging that the payment to the twenty teachers constituted an unfair labor practice. Defendant sought an order directing Petitioner to pay all other teachers on contract during the period and to make appropriate contributions to the Teachers Retirement System.

VIII

The matter was submitted to the Hearing Examiner on stipulated facts. The Hearing Examiner issued Findings of Fact, Conclusions of Law and a Proposed Order. The Hearing Examiner's single conclusion of law stated that "By its action in paying those twenty teachers who said they would work, seventeen of whom worked one day, and failing to pay the remaining teachers (Missoula County High School District) violated §39-31-401(1) and (3) MCA."

IX

The High School District filed exceptions to the Findings, Conclusions and Proposed Order; both parties filed briefs; the Board of Personnel Appeals issued its Final Order following oral argument.

X

The Board of Personnel Appeals issued a single Conclusion of Law: "The conduct engaged in by Missoula County High School

in this case is clearly prohibited conduct under §39-31-401, MCA."

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

I

This Court has jurisdiction over the parties and subject matter herein.

II

The Board of Personnel Appeals' Finding that the teachers did not make themselves available and remain subject to the call of Petitioner after June 4, 1981, is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

III

The Board of Personnel Appeals' Conclusion that the Petitioner was under no obligation to pay the teachers for more than the one day they reported for work is characterized as abuse of discretion and constitutes an error of law.

IV

The Board of Personnel Appeals' Conclusion that the payment to the teachers is inherently destructive of protected rights and that no proof of anti-union motivation of the Petitioner need be presented is characterized as abuse of discretion and constitutes an error of law.

V

The Board of Personnel Appeals' Conclusion that the conduct engaged in by Petitioner in this case is clearly prohibited conduct under §39-31-401, MCA, is charaterized as abuse of discretion, constitutes an error of law, and is prejudicial of substantial rights of the Petitioner.

From the foregoing Findings of Fact and Conclusions

of Law, the Court now makes the following:

ORDER

For the above reasons, it is hereby ordered that the Decision of the Board of Personnel Appeals is reversed, the Final Order of the Board is vacated, and the Unfair Labor Practice charge against the Petitioner, Missoula County High School District, is dismissed.

DATED this 26 day of November, 1985.

DISTRICT JUDGE

cc: Hilley & Loring
Worden, Thane & Haines
James E. Gardner

Delaneys

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 34-82

MISSOULA COUNTY HIGH SCHOOL EDUCATION ASSOCIATION, MEA	)	
Complainant,	)	FINAL ORDER
vs.	)	
MISSOULA COUNTY HIGH SCHOOL DISTRICT,	)	
Defendant.	)	

* * * * * * * * * * * * *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on December 8, 1983.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by attorneys for Respondent on January 19, 1984.

Oral Argument was scheduled before the Board of Personnel Appeals on March 2, 1984.

After reviewing the record and considering the briefs and oral arguments the Board states as follows:

The conduct engaged in by the Missoula County High School District in this case is clearly prohibited conduct under 39-31-401, MCA. This Board certainly strongly condemns such conduct. However, we are also aware of the problems attendant with a total make-whole order in this case; the monetary amount of such an order would impose a significant burden on the school district and the taxpayers of the area.

On the one hand this Board perceives the need to rectify the wrong done in this case and the need to send a strong message to all public employers in this state that the type of conduct engaged in by the Missoula County High

School District in this case will not be tolerated in public sector collective bargaining in Montana.

On the other hand this Board does not desire to overly burden the taxpayers of Missoula County because of the illegal acts done by their elected school board members.

This Board wants to provide a remedy that will: (1) effectuate the policy of the Act requiring collective bargaining and collective bargaining in this case means not attempting to discourage union membership through the commission of unfair labor practices which discriminate against employees for engaging in concerted activities; and (2) rectify the harm done to the education association by virtue of the Missoula County High School District's discriminatory conduct.

Accordingly, after long and careful consideration by all members of this Board, we order as follows.

A. It is Ordered that the Hearing Examiner's Findings of Fact and Conclusion of Law are adopted by this Board.

B. It is ordered that the Hearing Examiner's Recommended Order be amended to read:

The Missoula County High School District, its Trustees, officers, agents and representatives shall:

1. Cease and desist from discriminating against any of its employees, in violation of section 39-31-401(3) MCA and from interfering, restraining or coercing them in the exercise of their 39-31-201 MCA rights, in violation of 39-31-401(1) MCA.

Option I

2. Make those teachers whole who were not paid for the seventeen days after June 4, 1981 by paying them the amount they would have received had they been paid in accordance with the terms of the payment made to the twenty teachers who were paid for those seventeen days.

3. Pay with interest on the amounts due in No. 2 above in accordance with the method adopted by the NLRB in Florida Steel Corp., 231 NLRB 651, 96 LRRM 1070 (1977), and in accordance with the formula for computing interest due adopted by the Board of Personnel Appeals in Bruce Young v. City of Great Falls, Remedial Order, issued January, 1983.

Option II

4. Provide each striking teacher who was employed by the Missoula County High School District at the time of the 1981 strike 17 days of paid leave at a rate not to exceed six days of leave per year over a three year period. If a teacher entitled to the leave has retired or separated from employment with the school district since 1981 or retires or separates from the school district before the expiration of three years from the start of the 1984-85 school year, then that teacher can take the 17 days, or whatever portion of his/her 17 day allotment has not previously been used, in one lump sum at the time of such retirement or separation. The rate of pay for the taking of the leave, no matter how taken, shall be at the rate of pay that the teacher would have received under the 1980-81 collective bargaining agreement.

5. The school board must make the election of options within 30 days from the issuance of this Final Order by sending Notice of its election of option to the Board of Personnel Appeals. If Option II is selected, then that option should begin to be implemented as of the start of the next school year, 1984-85.

The remedy provided by the Board in this case is not to be viewed as precedent for future remedies should this type of conduct be engaged in by another public employer in the

future. In all future cases of this type, this Board will not hesitate to award full back pay if the circumstances warrant it.

DATED this 12 day of June, 1984.

for Robert R. Jensen

Alan L. Joscelyn
Chairman
Board of Personnel Appeals
Capitol Station
Helena, MT 59601

CERTIFICATE OF SERVICE

The undersigned does certify that a true and correct copy of this document was served upon the following on the 12th day of May, 1984, postage paid and addressed as follows:

June

Emily Loring
Hilley & Loring, P.C.
Executive Plaza, Ste. 2G
121 4th St. N.
Great Falls, MT 59401

Molly Shepherd
Worden, Thane & Haines
P.O. Box 4747
Missbula, MT 59806

Jean Gardner

BPAS.Anr

STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 34-82

MISSOULA COUNTY HIGH SCHOOL EDUCATION ASSOCIATION, MEA

Complainant,

-vs-

MISSOULA COUNTY HIGH SCHOOL DISTRICT,

Defendant.

FINDING OF FACT, CONCLUSION OF LAW AND RECOMMENDED ORDER

* * * * * * * * * * * * * * * * * *

BACKGROUND

Complainant filed charges against Defendant on October 19, 1982 alleging violation of section 39-31-401 (1) and (3) MCA when Defendant paid certain of its teachers for 18 days of a strike which Complainant engaged in against Defendant during 1981. Defendant denied any violation. After going through some discovery, the parties waived a factual hearing and entered into the following stipulation of facts and issue:

1. Complainant Missoula County High School Education Association (MCHSEA) is the recognized exclusive bargaining representative of Defendant's non-supervisory certificated or licensed employees.

2. The parties had a Master Contract, effective from July 1, 1979, through June 20, (sic) 1981, with an opening clause for salaries and insurance benefits for the second year of the agreement, 1980-81. The parties opened negotiations for the second year salaries, but were unable to reach agreement.

3. On May 11, 1981, Complainant went on strike against Defendant. During the first week of the strike, Defendant did not attempt to operate the schools.

4. On June 1, 1981, Defendant sent the letter attached as Exhibit 1 (see infra p. 3 of this decision) to all members of the bargaining unit.

5. Some twenty (20) teachers told Defendant's administration they would cross picket lines and return to work if Defendant attempted to operate. Those twenty (20) are:

B. L. "Jug" Beck	Bob Luoma
Kim Borden	Susan Mielke
Lucille Cole	Ann Morger
Marge Frette	Carol Morris
Georgianna Graf	Marilyn Pease
Walt Graf	Art Sikkink
Norma Ibsen	Diane Svee
Penny Jakes	Doug Vagg
Pat Kiner	Robert Wafstet
Gene Leonard	Carolyn Woodbury

6. Defendant opened the schools on June 4, 1981. Three (3) of the twenty (20) teachers did not report for work: B. L. "Jug" Beck, because of illness, and Walt and Georgianna Graf, because of a family emergency. For good and sufficient reasons, Defendant's Board of Trustees determined that it would be inapproprate to continue the operation of the schools. Defendant thereafter made no further attempt to operate the schools for the balance of the 1980-81 school year.

7. In September, 1982, following the threat of a lawsuit by one or more of the teachers who agreed to work, as evidenced by Exhibit 2 (see infra p.3 of this decision), Defendant paid the twenty (20) teachers identified in Paragraph 5 for the remaining eighteen (18) days which said teachers agreed to teach.

8. None of the teachers who did not indicate a willingness to work despite the strike were paid for the eighteen (18) days.

Issue: Whether payment of those twenty (20) teachers who said they would work, seventeen (17) of whom worked one (1) day, and failure to pay the remainder of the teachers is discrimination forbidden by M.C.A. section 39-31-401(1) and (3).

Exhibit 1 referred to in fact No. 4 above was signed by the Superintendent and states:

The school district has just received definite legal advice that our schools must be open for 180 days in the 1980-81 school year or we will lose $1.275 million in state aid.

This would mean that despite the voters support of the schools, the Board would have to make major cuts in next year's school program. A $1.275 million cut would necessarily mean much larger class sizes, reduced curricular and extra-curricular offerings.

Schools must open June 4, 1981 if this community is to maintain the quality of our school program for next year. During mediation meetings this last weekend the Board's negotiator offered Association leaders several additional concessions, hoping to resolve the dispute. These efforts were unsuccessful. The Board does not feel it can responsibly agree to the demands of the Association leadership.

High schools will open on June 5th for freshman, sophmore and junior classes. Students at the Missoula Vocational Technical Center will not report for classes until the opening of summer session on June 15. However, Missoula Vocational Technical Center staff should report to their director no later than 4:00 p.m. on June 3, 1981. All high school teachers should notify their principal by 4:00 p.m. June 3, 1981 indicating a willingness to work commencing with a PIR day at 8:00 a.m. June 4, 1981. All personnel at Central School should notify Mr. Joe Roberts by 4:00 p.m. June 3, 1981 and report to Central School at 8:00 a.m. on June 4th.

Teachers returning June 4th to completion of the school year shall receive for the 1980-81 school year an average 10.6% increase as per the attached salary schedule which includes increments and horizontal changes. This payment will be retrocative to August 27, 1980. All fringe benefits including insurance for June will be paid.

Teachers who do not report for duty by 8:00 a.m. on June 4, 1981 will be replaced.

Exhibit 2 referred to in fact No. 7 is two letters,

dated April 27, 1982 and July 12, 1982, from the law firm representing Robert Luoma to the Missoula County High School Board of Trustees. They read as follows:

April 27, 1982

Please be advised that this firm has been contacted by Robert Luoma, a teacher at Sentinel High School, with respect to a potential claim against the Missoula County High School arising out of a letter dated June 1, 1981, wherein he was offered employment beginning June 4, 1981, to the end of the 1981 school year. According to Mr. Luoma, in order to avoid the potential loss of certain funds from the State of Montana, the MCHS offered to rehire any teacher reporting to work on June 4, 1981, and further advising teachers who did not report to work that they would be replaced. A copy of the letter received by Mr. Luoma is enclosed with this letter.

Pursuant to this offer Mr. Luoma and several other teachers showed up for work on June 4, 1981, and remained there for the day. Further, on June 5, 1981, Mr. Luoma showed up at Sentinel High School ready, willing and able to perform work pursuant to the offer made by MCHS, but found that the doors were locked. The doors remained locked throughout the remainder of the 1980-1981 school year.

As you are probably aware, Mr. Luoma signed a written contract to teach at Sentinel High School during the 1980-1981 school year, a copy of which is enclosed with this letter. That contract was not terminated at any time by either Mr. Luoma or MCHS, and as is evidenced by his appearance for work on June 4, 1981, Mr. Luoma was ready, willing and able to perform according to its terms at all times. Further, your letter of June 1, 1981, constitutes an offer of employment for a specific term notwithstanding the existence of a labor dispute, and you did not reserve the right to terminate the offer or any agreement arising out of the acceptance thereof because of difficulties involved in opening the school. It is my opinion that a contractual relationship existed between MCHS and Mr. Luoma for employment for a specific number of days commencing on June 4, 1981, and ending on the 180th day of the 1980-1981 school year. You did pay Mr. Luoma for his work on June 4, but you have refused to pay him for work that he was prepared to perform for the remaining term of the contract. This in my opinion is a breach of the agreement between you and Mr. Luoma and he is entitled to damages equal to the amount that he would have been paid had he been allowed to work.

The purpose of this letter is to settle this dispute without resort to litigation. I would hope that you would reconsider your position and agree to pay Mr. Luoma. If you have any questions or wish to discuss this matter, Mr. Luoma and I would be happy to meet with you.

July 12, 1982

I have written to you in the past concerning a claim that Robert Luoma has against the High School District with respect to his willingness to work during the month of June, 1981, following an offer of employment made by the High

School District in writing, dated June 1, 1981. As you know that offer was to employ teachers who returned by 8:00 a.m. June 4th, 1981, for the remainder of the 1980-1981 school year. Mr. Luoma and a few other teachers accepted the School District's offer and returned to work on June 4th, 1981, and remained available for work for the rest of the school year. They did not perform work because of the decision of the School District not to reopen the schools after June 4th, however, since Mr. Luoma was prepared to perform his side of the bargain, he is entitled to the wages that he would have received had the School District performed its side of the bargain.

In the April 27th letter I requested that you reconsider your decision not to pay Mr. Luoma and as of yet I have not heard a response. Mr. Luoma is seriously contemplating commencing legal action, but before doing so he would like to know whether the School Board intends to stand by its decision not to pay the teachers who accepted the District's offer to return to work. A prompt response would be greatly appreciated.

The parties also stipulated to a briefing schedule which was completed when Complainant submitted its reply brief on August 30, 1983. Subsequent to the completion of the briefing schedule, counsel for Defendant sent a letter dated September 1, 1983 to the hearing examiner in which he sought to point out that Defendant paid the twenty teachers for the eighteen days they had agreed to work from June 4, 1981 to the end of the school year, not the fourteen days preceeding June 4.

In response to Defendant's letter of September 1, 1983, counsel for Complainant sent a letter dated September 12, 1983 to the hearing examiner. She stated that there was no reference in the stipulated facts to which eighteen days the teachers were paid for. She said the school year was to be 180 days, all teachers had worked 162 days and there were eighteen days remaining for which the twenty teachers were paid.

Although a determination of which eighteen days the returning teachers were paid for is not dispositive of the issue stipulated to, it seems clear that the period was from

June 4th forward. The Superintendent's letter of June 1st is not ambiguous on that point.

DISCUSSION

The charges filed allege that sections 39-31-401(1) and (3) MCA were violated by Defendant. Section 39-31-401(1) makes it an unfair labor practice for a public employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201." Section 39-31-201 MCA protects public employees "in the exercise of the right of self-organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint or coercion." Section 39-31-401(3) MCA prohibits discrimination by a public employer in regard to any term or condition of employment in order to encourage or discourage membership in any labor organization. Sections 7, 8 (a)(1) and 8 (a)(3) of the National Labor Relations Act are practically identical to sections 39-31-201 and 401 (1) and (3) MCA. The Board of Personnel Appeals has been guided in the past by National Labor Relations Board and federal court precedent. The Montana Supreme Court has upheld that practice in State Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 529, P.2d 785 (1974), 87 LRRM 2101; AFSCME Local 2390 v. City of Billings, 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976).

Complainant contends that the action of Defendant in paying the non-striking teachers for the eighteen days, only one of which was actually worked or attempted to be worked, unlawfully interfered with its protected concerted activity

and discriminated against employees for engaging in such concerted activity. Defendant urges that the payment to the non-striking teachers for days when they were not engaged in productive activity for the schools is not illegal. Defendant cites General Electric Co., 80 NLRB 510, 23 LRRM 1094 (1948), as being dispositive of the issue. I do not agree. The facts in this case are distinguishable from the facts in General Electric where the employer divided its employees into two groups depending on their willingness to work during a nine week strike. The employer refused to give continuous service credits to strikers for the period of the strike, but did give service credit and full wages to those employees who made their services available and remained subject to the employer's call at all times in a standby capacity. The National Labor Relations Board held that the refusal to give service credits to the strikers, inasmuch as it denied accural of seniority, was a violation of section 8 (a)(3) and (1) of the National Labor Relations Act. The NLRB went on to say that payment by the employer of wages to the non-strikers for the period of the strike, although they did not actually work, was not discriminatory; that the non-strikers remained subject to the employer's call at all times in a standby capacity which was compensable as a matter of law (citing Social Security Board vs. Nierotko, 327 US 358). Here, there is no evidence that the twenty teachers were on call in a standby capacity for more than the one day school was open on June 4th. After June 4th there was no reason to have them make themselves available because the schools were closed. They did not make their services available during the seventeen days in question here and remain subject to the call of Defendant; they could

not have been on call because Defendant had no reason to call them after it closed the schools. Payment for the one day they actually reported for work, June 4th, is not in dispute. When Defendant closed the schools, the school year ended; there was no work to be done nor a need for standby teachers.

In contrast to the payment to the non-strikers in the General Electric case for being in a standby capacity, which is compensable as a matter of law (see Social Security Board, supra), the only reason which prompted the Employer here to make the disputed payments was a threat to sue on a disputable claim. Furthermore, in General Electric the questions before the NLRB revolved around reinstatement rights of strikers. Specifically, the complaint alleged that the company violated the NLRA by refusing to credit strikers with continuous service for the period of the strike thus depriving them of full seniority, vacation and pension rights. The question of whether payment of wages to non-strikers when they are neither working nor in a standby capacity interfered with the rights of employees to engage in concerted activities in the future was not raised and was not at issue. General Electric, supra, see Intermediate Report of the Trial Examiner, 80 NLRB 2517. Both the trial examiner and the NLRB directed their analyses of the facts and law toward reinstatement rights of strikers. There is no allegation here that Defendant refused to bestow all accrued benefits to the striking teachers. The allegation is that the additional benefit which Defendant awarded the non-strikers (the twenty became non-strikers after they agreed to return on June 4th) discriminated against strikers and interfered with their right to engage in concerted

activities and other rights set out in 39-31-201 MCA. Cases citing General Electric since it was issued set forth three principles: (1) an employer may not withhold from strikers a benefit which will give non-strikers a long term advantage, e.g., additional seniority, (2) an employer may not deny strikers rights and benefits earned before the strike, and as Defendant points out, (3) an employer is not required to finance a strike against itself. The third principle is a corollary of the second. Since an employer can deny strikers benefits which did not accrue before the strike, it stands to reason it is under no obligation to give strikers more than what they had coming, i.e., it does not have to "finance" the strike against itself. System Council T-4 v. NLRB, (Illinois Bell Telephone Co.), 77 LRRM 2897, 446 F.2d 815 (7th CA, 1971); Emerson Electric Co., v. NLRB, 107 LRRM 2112, (3rd CA) 650 F.2d 463 (1981) amended 107 LRRM 3303; Texaco, Inc. v. NLRB, 112 LRRM 3206, (5th, CA 1983).

There are essentially two questions raised by the charges filed by Complainant. The first is whether the employer's conduct in paying the non-strikers (those teachers who returned on the 4th of June) for those days after the schools were closed discriminated against the strikers in violation of section 39-31-401 (3) MCA, which is the equivalent of 8 (a)(3) of the NLRA. The second question is whether the employer's conduct interfered, restrained of coerced employee activity in violation of section 39-31-401(1) MCA and as set forth in section 39-31-201 MCA. The equivalents of those sections are sections 8 (a)(1) and 7 of the NLRA. It is elementary that a violation of section 8 (a)(3) entails derivatively a violation of section 8 (a)(1), but the converse is not necessarily true. R. Gorman, Labor Law 132 (1976).

The U.S. Supreme Court in NLRB v. Erie Resistor Corp, 373 U.S. 221, 53 LRRM 2121 (1963) held, in finding an 8 (a)(3) violation by an employer, that there is certain employer conduct which is so inherently discriminatory or destructive of employee rights that even business objectives will not save it. There the company was under stiff competition for its product when the union struck. In an attempt to induce replacements to accept employment and to get strikers to return to work, the company offered and awarded twenty years of super seniority for purposes of layoff and recall after the strike ended. Subsequent to a later reduction in the work force, former strikers were laid off and those with less service were retained. The Court went on to state that although an employer may claim his actions were necessitated by business ends and that his purpose was not to discriminate:

> Nevertheless, his conduct does speak for itself--it is discriminatory and it does discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, (citing cases) of weighing the interest of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.
>
> Erie Resistor Corp., Supra, 53 LRRM at 2124

It should be noted from the outset that there is nothing in the stipulated facts to suggest that the Missoula County High School District trustees had an overt hostile motive or intent when they decided to pay the twenty teachers for seventeen days after the schools were closed. However, a long line of cases arising out of the private sector and

decided by the federal courts have addressed the motive requirement as it applies to alleged section 8 (a)(1) independent violations and 8 (a)(3) and derivative 8 (a)(1) violations. See The Scienter Factor in sections 8 (a)(1) and (3) of the Labor Act, 52 Cornell L. Q. 491 (1976).

In most cases an employer's reason for discriminating will determine whether he violated 8 (a)(3). If the purpose was to encourage or discourage union membership it is an unfair labor practice. However, specific anti-union purpose need not be shown. In Radio Officers' Union v. NLRB, 347 U.S. 17, 33 LRRM 2417 (1954) the Court held that specific evidence of intent to encourage or discourage is not an indispensable element of proof of an 8 (a)(3) violation:

> The language of Section 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus, this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed... But it is also clear that specific evidence of intent to encourage or discourage is not an indispensible element of proof of a violation of 8(a)(3)... an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequences.
>
> Radio Officer's Union, supra, 33 LRRM at 2427 and 2428

The Court, in NLRB v. Great Dane Trailers, Inc, 388 U.S. 26, 65 LRRM 2465 (1967), announced a formula for proving discrimination in 8(a)(3) cases:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be

> proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

The U.S. Circuit Courts of Appeal and the NLRB have applied the principles of Erie Resistor and Great Dane to fact situations arising from later private sector cases where allegations of 8(a)(1) and 8(a)(3) violations were made. More specifically, where differentiations by employers have been made between strikers and non-strikers in the provision of bonuses or other special benefits, the Board and courts have viewed it with disfavor. In Aero-Motive Manufacturing Co., 195 NLRB No. 133, 79 LRRM 1496 (1972), enf'd. 475 F.2d 27 (6th CA, 1973) where the employer paid a $100.00 bonus to employees who worked during a strike, while denying it to strikers, even though the bonus was not announced or awarded until after the strike ended, the NLRB found an 8(a)(1) violation. In the Aero-Motive case the Board cited NLRB v. Illinois Tool Works, 153 F.2d 811, (7th CA), 17 LRRM 841 for the principle that whether employer conduct unlawfully interferes with any section 7 right and is therefore violative of section 8(a)(1), depends on whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights, the NLRB went on to reason:

> It is by now axiomatic that employers violate our Act if they grant special benefits to employees who refrain from engaging in concerted activity and who deny such benefits to those who choose to engage in such activity. Respondent urges as its principle defense to the application of this basic principle that there was no illegal interference here because the bonus was not granted until after the strike had ended. While it is true that the absence of an advance announcement or payment necessarily means that the bonus was not used as an inducement to refrain from concerted activity at the time the strike was in progress, we cannot put on

> blinders and fail to look at the impact of the payment on employees at the time it was made and for the future. Once granted, the strikers were plainly disadvantaged with respect to the non-strikers and it was equally plain that the distinction was drawn solely on the basis of who engaged in protected, concerted activity and who did not. This not only created a divisive wedge in the work force, but also clearly demonstrated for the future the special regards which lie in store for employees who choose to refrain from protected activity.
> ...
> However the Respondent may have characterized the payment, we believe that the principle impact of the payments will be to discourage employees from engaging in protected activity in the future. And we think this is true even if Respondent's heart was pure.
>
> Aero-Motive Mfg., supra, 79 LRRM at 1498

Since I am unable to conclude from the facts here that the twenty returning teachers employed by Defendant were in a standby capacity, it appears the payment to them, for more than the one day they reported for duty, was in the nature of a special benefit or bonus. The U.S. Court of Appeals, Fourth Circuit, in NLRB v. Rubatex Corp., 601 F.2d 147, 101 LRRM 2660 (1979), cited Aero-Motive, supra, and agreed with its holding. The Court held that the NLRB was warranted in finding that the employer violated section 8(a)(1) when it made bonus payments only to union members who crossed picket lines, despite the contention that the impact of the payments on future union activity was speculative and insubstantial. "...The sum of $100 is not such a small amount that company employees will not think twice about participating in a future strike. Similarly, that only thirteen of the company's 830 union employees were rewarded is irrelevant in view of the fact every employee who decided not to strike received a bonus." Rubatex Corp., supra, 101 LRRM at 2662.

In its brief Defendant cites Portland Willamette Co. v. NLRB, 534 F.2d 1331 (9th CA,1976), 92 LRRM 2113 as being instructive with respect to the application of Great Dane

principles to the facts in the present case. After the NLRB found an 8(a)(3) violation where the employer had made a retroactive wage increase to employees who had worked during a certain period and who were still on the payroll at a specified date, the Court set aside the order. The Court found that the employer's conduct was not inherently destructive and that there was ample business justification for implementing the retroactive wage increase:

> Those cases finding an employer's conduct inherently destructive, bearing their own indicia of intent, are cases involving conduct with far reaching effects which would hinder future bargaining, or conduct which discriminates solely upon the basis of participation in strikes or union activity. Examples of inherently destructive activity are permanent discharge for participation in union activities, granting of superseniority to strike breakers, and other actions creating visible and continuing obstacles to the future exercise of employee rights.
>
> Portland Willamette Co., supra, 92 LRRM at 2115

As Defendant states, the Court found that the employer's action was limited to a particular instance and could have no continuing consequence such as the granting of super seniority. However, the Court also found that the:

> "Selection of persons for retroactive pay increases could not be said to have been based on whether or not they were strikers or nonstrikers as such." (Quoting the Administrative Law Judge)

The facts in the present case are different. The employer's conduct in paying the twenty teachers discriminated solely on the basis of participation in the strike after June 3rd. The Court in Portland Willamette found that there was not an 8(a)(3) violation because: (1) the employers conduct did not discriminate solely on the basis of strike activity, (2) because the employer had a legitimate business end to serve, and (3) because of other facts unique to that case. The same Court, in reviewing an 8(a)(1) violation found by the NLRB in 1980, held that granting a one-day

vacation to nurses who did not strike, who abandoned the strike, or who were hired during the strike, but not granting it to nurses who continued the strike was an unfair labor practice. In NLRB v. Swedish Hospital Medical Center, 104 LRRM 2751, 619 F. 2d 33 (9th CA, 1980), the Court stated, despite the hospital's argument that its action had a nominal effect on its employees' right to strike and was prompted by a desire to compensate non- strikers for added responsiblities:

> The grant of a one day vacation is not so insignificant that the nurses will not reflect upon participating in future strikes. Similar benefits granted to union members who have chosen not to strike have been held to unlawfully interfere with the right of those employees to strike in the future. (Citing Great Dane Trailers, Erie Resistor, Rubatex, supra.)
>
> Swedish Hospital, supra, 104 LRRM at 2752

In Soule Glass and Glazing Co. v. NLRB, 107 LRRM 2781, 652 F.2d 1055 (1st CA, 1981) the Board was upheld in finding that the employer violated section 8(a)(1) when it granted wage increases to non-strikers, non-bargaining unit employees on the first day of a strike. In determining whether an interference with section 7 rights outweighed the company's business justification, the Court declared that, "The relevant inquiry is whether the wage increase impermissibly discriminated against the union by demonstrating for the future the special rewards which lie in store for employees who choose to refrain from protected strike activity, (Citing Aero-Motive, supra) and 'bringing home in concrete fashion to those employees who were aware of it that it did not pay to become associated with the union,' (Citing Chanticleer Inc., 63 LRRM 1237, 1966)."

A recent case out of the Court of Appeals for the District of Columbia is worth noting. In George Banta Co. v. NLRB, 686 F.2d 10 (CA D.C. 1982), 110 LRRM 3351, the Court

held that the employer violated sections 8(a)(1) and 8(a)(3) by granting preferential reinstatement and seniority rights to returning employees who abandoned the strike before it ended. Strikers who were later reinstated were assigned to classifications deemed appropriate by the employer. The employer did not deny the discriminatory effect of the reinstatement practice, but rather, claimed that the practice gave no prospective benefits to the non-strikers as did the super seniority benefit granted by the employer in Erie Resistor. The Court rejected that argument and commented:

> It defies reason to claim that while Erie Resistor bars employers from unlawfully favoring cross-overs with seniority benefits, the case is silent about rates of compensation. Whether the benefit is "current" or "prospective," the relevant question is whether the employer has illegally burdened the statutory right to strike by artificially dividing the work force into those who did not engage in strike activity and those who did. "Employees are henceforth divided into two camps: Those who stayed with the union and those who returned before the end of the strike and thereby gained..." (Citing Erie Resistor.) Such divisions which stand "as an ever-present reminder of the dangers connected with striking and with union activities in general," id., may not be countenanced under the Act because the claimed business purpose does not outweigh the necessary harm to employee rights. See id. at 237. In such cases, the nature of the particular benefit is irrelevant.
>
> George Banta Co., supra, 110 LRRM at 3357

To the extent that it is possible to summarize the standards which may be extracted from the section 8(a)(1) and 8(a)(3) cases which have been cited in counsels' briefs and noted above, one could say that where the effect of the employer's action upon section 7 rights is significant, motive is irrelevant. In that type of case the establishing of a legitimate business justification is of no avail. Where the effect is minor, however, the action will be deemed to be justified when significant and legitimate interests of the employer are shown. See generally, Motive

and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 Yale L.J. 1269 (1968); and 52 Cornell L.Q. 491, supra. Where the action or conduct of the employer has a destructive impact on employees' rights to engage in activities protected under section 7 of the NLRA, an unfair labor practice may be found even if the employer was motivated by a legitimate business desire. In general, conduct which treats union activists (strikers) in an inferior manner to non-union activitists (non-strikers) has a devastating or destructive impact. If the impact is only slight, to avoid the finding of an unfair labor practice, the employer must show it had a legitimate and substantial business reason for taking the action. Whether the reason was legitimate and substantial depends upon whether the business reason outweighs the harm to the employees, not upon the employer's good intent or lack of bad intent.

From the facts stipulated to in this case the conclusion which seems logical is that Defendant's conduct in paying the twenty teachers for seventeen days which they did not work nor stand ready on call is inherently destructive of the rights of the remaining, striking teachers. Under the principles set forth in the Great Dane case and subsequent cases where those principles have been interpreted and refined, that conclusion seems inescapable. Even using the criteria of the Ninth Circuit in Portland Willamette, supra, cited by Defendant, the conduct complained of here appears inherently destructive. The conduct of Defendant will affect future bargaining because the realization will be present on the minds of union supporters that the employer will award special benefits to non-strikers, if the union decides a strike is necessary to promote its bargaining goals. A divisive wedge will have been driven between

members of the union and work force, if the situation is not remedied. The action of Defendant discriminated solely on the basis of union activity, those who crossed the picket lines and agreed to work were singled out for special treatment. The conduct created an unnecessary obstacle to any future concerted activities which the employees may choose to engage in, including collective bargaining and contract negotiations. Internal union affairs, it may be inferred, will be adversely affected if an employer is permitted to differentiate between union activists and non-activists.

While it is unnecessary to consider the employer's asserted legitimate and substantial business justifications and motivation, completeness of analysis would seem to require it. To the suggestion that the employer would have been perpetrating a fraud upon the twenty teachers if it had not paid them for eighteen days, suffice it to say that, unlike the facts in Portland Willamette, supra, Defendant was under no apparent obligation to pay them for more than one day. There was no obligation to pay them beyond "the completion of the school year." The school year ended when the trustees closed the schools. That the School District was faced with the prospect of losing $1.275 millon in state aid clearly explains its attempt to open the schools; however, it does not justify disparate treatment toward strikers once it decided to close the schools. It is difficult to imagine that Missoula County High Schools would have been operated differently in subsequent years or have been adversely affected had the trustees not paid the returning teachers for the additional seventeen days after they decided to discontinue operations in June of 1981. There is no evidence that the schools did not function as they always had from

the fall of 1981 on. The challenged payments were not made until September 1982. At most Defendant would have been placed in the position of defending an alleged breach of contract action brought by one teacher (and perhaps joined in by nineteen other teachers) based on, at best, a disputable claim. When one weighs the effect of the sum of money which the Employer paid to the non-striking teachers (plus or minus $40,000 would be a reasonable approximation) and the message that payment sent to the strikers, against the Employer's proffered business justification, it appears that the desire to reward non- strikers outweighed the Employer's desire to resist having a substantial amount taken from its treasury.

Even if it were possible to find that the Employer's discriminatory conduct had only a "comparatively slight" adverse effect on the striker's section 39-31-201 MCA rights, the harm to the teacher's right to bargain collectively and engage in other concerted activities in the future far outweighs any legitimate business justification the trustees may have perceived. There was no substantial and legitimate business justification for the Employer's action.

CONCLUSION OF LAW

By its action in paying those twenty teachers who said they would work, seventeen of whom worked one day, and failing to pay the remainder of the teachers, Defendant violated sections 39-31-401(1) and (3) MCA.

RECOMMENDED ORDER

Based on the stipulated facts and conclusion of law herein, IT IS ORDERED that the Missoula County High School District, its Trustees, officers, agents and representatives shall:

1. Cease and desist from discriminating against any

of its employees, represented by the Missoula County High School Education Association, MEA, in violation of section 39-31-401(3) MCA and from interfering, restraining or coercing them in the exercise of their 39-31-201 MCA rights, in violation of 39-31-401(1) MCA.

2. Make those teachers whole who were not paid for the seventeen days after June 4, 1981 by paying them the amount they would have received had they been paid in accordance with the terms of the payment made to the twenty teachers who were paid for those seventeen days.

3. Pay interest on the amounts due in No. 2 above in accordance with the method adopted by the NLRB in Florida Steel Corp., 231 NLRB 651, 96 LRRM 1070 (1977), and in accordance with the formula for computing interest due adopted by the Board of Personnel Appeals in Bruce Young v. City of Great Falls, Remedial Order, issued January, 1983.

4. Post in conspicuous locations where teachers regularly congregate in each of Defendant's high schools the attached notice marked "Appendix."

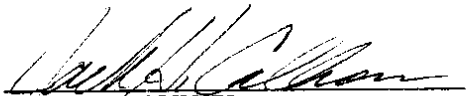
5. Notify this Board within twenty days from receipt of its final order what steps have been taken to comply with such order.

NOTICE

Exceptions to these findings, conclusion and recommendation may be filed within twenty days of service. If exceptions are not filed the recommended order will become the final order of the Board.

Dated this 8th day of December, 1983.

BOARD OF PERSONNEL APPEALS

BY 
JACK H. CALHOUN
Hearing Examiner

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 8th day of December, 1983:

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